INDEX TO PETITION.

INDEX TO BRIEF.

INDEX TO BRIEF (Continued).

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

STATUTES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

No.

TERM, 194

SERGE M. RUBINSTEIN, ALSO KNOWN AS SERGE MANUEL RUBINSTEIN DE ROVELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Serge M. Rubinstein, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit dated February 5, 1948, affirming a judgment of the District Court for the Southern District of New York convicting petitioner on four counts of violating the Selective Training and Service Act of 1940 by submitting and conspiring to submit false statements to secure an occupational deferment.

The sentence imposed by the District Court as affirmed by the Circuit Court was as follows: Petitioner was sentenced to imprisonment for two and one-half years and fined $10,000. on each of four counts, the terms of imprisonment to run concurrently (2191a).

Petitioner has been in custody since the 23rd day of April, 1947.

A. STATEMENT OF THE CASE.

Under an indictment returned January 30, 1946, petitioner was indicted and charged in five counts with having committed offenses under Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 894, 50 U. S. C. A., App. Sec. 311, hereinafter referred to as "the Act". Allen Gordon Foster was joined with him in the second and third counts, and James C. Hart in the fourth and fifth counts.

The trial before the Honorable J. F. T. O'Connor, District Judge and a jury in the United States District Court, Southern District of New York lasted from March 4, 1947 until April 22, 1947. Each defendant was found guilty as charged. James C. Hart did not appeal.

The Circuit Court of Appeals for the Second Circuit reversed petitioner's conviction on Count 1, and affirmed his conviction on Counts 2, 3, 4 and 5.

The governing provision of the Act subjects to punishment "any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness, or liability or nonliability, of himself or any other person for service . . . " (for full text see Appendix A).

Count 2 charged that on February 2, 1943, Rubinstein and Foster submitted and caused to be submitted an occupational questionnaire, form 42-A, which contained the following alleged false statements:

> "(a) That because of the character of Serge M. Rubinstein's functions, the successful continuance of the operations of Panhandle Producing and Refining Co., Midway Victory Oil Co. and Panhandle Steel Products Co. depends upon his remaining with the said companies;
>
> (b) That it is impossible to replace Serge M. Rubinstein without seriously impairing the drilling

program and otherwise hampering the activities of the Panhandle Producing and Refining Co., Midway Victory Oil Co. and Panhandle Steel Products Co."

Count 3 charged that petitioner and Foster between March 1, 1942 and September 1, 1943 conspired to commit the substantive offense charged in Count 2.

Count 4 charged that on October 12, 1943 petitioner and Hart submitted and caused to be submitted an occupational questionnaire, form 42-A, which contained the following alleged false statements:

(a) That Rubinstein was executive assistant to the president of Taylorcraft Aviation Corporation, in charge of finance and administrative matters on October 12, 1943;

(b) That he was employed by that corporation and had entered the job of executive assistant to the president on August 2, 1943.

Count 5 charged that between July 1, 1943 and January 30, 1946, the date of the indictment, petitioner and Hart conspired to enable petitioner to evade the act by making false statements that he entered the employ of Taylorcraft on August 2, 1943, as executive assistant to the president in charge of finance and administrative matters.

Prior to January 24, 1943, petitioner had been given an occupational deferment and classified II-B. His Local Board on that date notified him that his deferment to May 25, 1943, was to be reopened (78a). Upon his request, the Board accorded him a hearing on February 2, 1943.

Prior to the hearing on that evening Foster was in the office of Hugh Duffy, Secretary and Director of the companies. Petitioner's secretary brought a form 42-A to Duffy who started to read it (357a). This form is an affidavit as to occupation, which is executed only by the em-

ployer. Petitioner then came in, took the form from Duffy and gave it to Foster who then said that he would like to read it.

Petitioner said it was not necessary for Foster to read it; that Foster could sign it and petitioner would explain it to him on the way uptown. It would appear that Foster's presence was merely accidental since an accompanying letter (G. Ex. 15-B) was being prepared for Duffy's signature (358a) and there was no evidence that Foster was in the office for the purpose of signing anything (358a).

Both Duffy and Foster signed G. Ex. 15-B but Foster alone signed Form 42-A (G. Ex. 15-A). Both documents however contain substantially the statements alleged to be false in the indictment.

Foster signed the affidavit as director and officer both of Midway Victory Oil Company and Panhandle Producing & Refining Company and as an officer of the Panhandle Steel Products Company.* Shortly thereafter petitioner appeared at the local board and submitted for its consideration a group of papers (G. Ex. 15 to 15-I) one of which was the form 42-A (G. Ex. 15-A) signed by Foster, which, as noted above, contained the statements alleged in the indictment to be false.

These papers also set forth that petitioner was President of Midway Victory Oil Company; President of Panhandle Producing and Refining Company; President of Panhandle Steel Products Company; and that he was in charge of the general management, supervision, and operations of each company. These statements were all true, and were not charged to have been false.

The II-B classification was continued as the result of the hearing and affidavits. An appeal was taken on behalf of the Government to the Appeal Board, which resulted in a I-A classification on May 7, 1943 (29a). A later Presidential appeal from the Selective Service Board was re-

* Foster was not in fact an officer of Panhandle Steel Products Company but the indictment makes no charge of falsity in this respect.

turned on September 7th, and the I-A classification was affirmed.

On the same date, however, the local Selective Service Board again classified petitioner in II-B (41a). An appeal was again taken by the Government, which resulted in a I-A classification on October 2nd and petitioner was ordered to report for induction on October 20th (42a). At his request, a rehearing was granted on October 12, 1943.

On that date petitioner appeared and presented a written request for reconsideration and reclassification in II-B; this request contained a statement that he was then executive assistant to the president of Taylorcraft Aviation Corporation and that the company was engaged in the manufacture of aeroplanes for the war (G. Ex. 25). Attached thereto was a copy of form 42-A, employer's statement of occupational classification, signed by Hart, president of Taylorcraft. The affidavit purported to have been sworn to on October 9, 1943, but actually it was dated back from Sunday, October 10, 1943 (717a, 718a) and it contained statements that petitioner was then executive assistant to the president in charge of finance and administrative matters for the corporation, and that he entered his employment on August 2, 1943. The original form 42-A signed by Hart was mailed by him directly to the Selective Service Board (G. Ex. 26).

These documents, G. Ex. 25 and G. Ex. 26, furnish the basis for the charges contained in Counts 4 and 5.

The local board continued the I-A classification, which was affirmed upon appeal, and petitioner was ordered to report for induction on November 17, 1943 (56a). On November 16th, as the Act permitted him to do because of his status as a neutral alien, he filed form 301 entitled "Application by Alien for Relief from Military Service" (56a). The Board granted him the relief provided for by the Act and classified him IV-C (63a).

Petitioner and Foster were indicted on January 30, 1946, and the trial, conviction and appeal followed. Duffy was not indicted nor named as a co-conspirator.

B. THE QUESTIONS PRESENTED.

The following questions arise:

1. Where the Act makes criminal false statements as to "nonliability" for service, and the Act as well as the penal section thereof distinguishes between "nonliability" and "deferment", are false statements made merely for the purpose of "deferment" criminal? (Requests for Charge 3, 10, 45, 46, 62, 63, 71, 72, 95 (2195a-2206a), Denied (2151a-2161a).)

2. Are not assertions that the successful continuance of corporate operations depends upon its chief executive officer remaining with it and that it is impossible to replace him without seriously impairing the activities of the corporation, merely expressions of opinion and expectation and not "false statements" such as are proscribed by the Act? (Counts two and three.) (Requests for Charge 6, 7, 47, 48, 49, 50 (2193a, 2199a-2200a), Denied (2152a, 2156a).)

3. In view of petitioner's conviction of the substantive offenses charged in counts two and four, does his conviction under counts three and five, charging conspiracy, fall within the prohibition that where a substantive offense as charged requires concert of action there can be no additional conviction and punishment for conspiracy to commit that offense? (Motion for Acquittal, 2146a, 2185a, Denied 2146a, 2185a.)

4. Was it error for the Court to refuse a point for charge that no conviction could be had upon a finding that the corporations were not engaged in the war effort to the extent claimed, where the prosecution presented such proof but the indictment contained no charge of falsity in that respect? (Requests for Charge 55, 56, 58 (2200a-2201a), Denied (2156a).)

5. Does the evidence sustain petitioner's conviction on each of the four counts? (Motion for Judgment of Acquittal, 2146a, 2185a; Denied, 2146a, 2185a.)

C. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The Court below has decided important questions of federal criminal law which have not yet been, but which should be, settled by this Court; it has also decided such questions in conflict with applicable decisions of this Court and of other Circuit Courts of Appeals, as hereinafter set forth:

1. The indictment charged petitioner, in accordance with the penal section of the statute, with making false statements as to "nonliability" for service. However, the statements set forth in the indictment and shown by the evidence were not statements as to nonliability but were statements as to deferment only, which are not made criminal by the Act. "Nonliability" and "deferment" are different. The former does not include the latter and throughout the Act and particularly in the penal section the sharp distinction is clearly made.

The court below, although conceding this distinction, affirmed petitioner's conviction anyway. Under the guise of ascertaining the legislative intent, it supplied judicially what it virtually conceded was a *casus omissus* in order to avoid what it thought would be a "loophole." This constitutes unacceptable judicial legislation often condemned by this Court. *U. S. v. Weitzel*, 246 U. S. 533 and examples under Note 2; *Ebert v. Posten*, 266 U. S. 548; *Todd v. U. S.*, 158 U. S. 278; *U. S. v. Harris*, 177 U. S. 305; *Viereck v. U. S.*, 318 U. S. 236. The court below altered by judicial construction the unambiguous words of a statute which imposes criminal penalties, so as to punish one not otherwise within its reach.

The coverage of the penal section of this important federal criminal statute is an issue of first impression in the federal courts and should be settled by this Court, so that if it is ever again necessary to use it, its meaning will be clear, or it will have been amended. A denial of certiorari will not settle the question.

2. In holding that an assertion of an opinion, particularly as to the future, is punishable as a "false statement" within the meaning of the Act, the court below acknowledged a conflict between its holding and that of the Court of Appeals of the District of Columbia in *Chaplin v. U. S.*, 157 Fed. 2d 697 (App. D. C. 1946). Other Circuit Courts, deciding the same issue under other federal statutes, are also in conflict. *Biddle v. U. S.*, 156 Fed. 759, 764 (C. C. A. 9, 1907); *Little v. U. S.*, 73 Fed. 2d 861, 868 (C. C. A. 10, 1934). See also *Sawyer v. Prickett*, 19 Wall. 146; *Gordon v. Butler*, 105 U. S. 553, 557.

In reaching the present decision the court below created the novel doctrine that administrative hardship relieves the prosecution of the burden of proving guilt as defined and limited by the statute.

3. Petitioner is charged in each of the second and fourth counts with "making and being a party to the making" of certain false statements contained in Form 42-A (G. Ex. 15a). This was an employer's questionnaire which could have been executed only by an employer, viz., Foster in Count 2 and Hart in Count 4. *Petitioner alone could not have committed the crimes charged in these counts.* Thus, his guilt could be predicated only upon his being a "party to the making", precisely as if the statute applied only to one who was "a party to the making." Therefore his additional conviction and punishment on the conspiracy counts, 3 and 5, should not have been permitted because it falls within the rule that where a substantive offense requires concert of action there can be no additional conviction of conspiracy to commit that offense.

There is no clear-cut decision by this Court applying the rule or defining its limitations, although it is recognized in *Gebardi v. U. S.*, 287 U. S. 112, 123, and in *Pinkerton v. U. S.*, 328 U. S. 640, 643. There should be. It is unsettled whether this question must be resolved by considering the statute alone as held by the court below or whether reference may be had to the charge contained in the indictment

and the facts of the case. In fact there is a conflict in the Second Circuit itself because in *U. S. v. Zeuli*, 137 F. 2d 845, the court considered not only the indictment but also the evidence.

4. The court below countenanced a violation of petitioner's fundamental right to be convicted only upon a charge fairly made and fairly tried. The prosecution introduced evidence to show that the corporations were not engaged in the war effort to the extent petitioner claimed. But this was not the charge in the indictment, and, while that evidence was admissible on the question of intent, *no conviction* could properly rest upon such proof. The trial court refused petitioner's request so to charge and the court below sustained the conviction. The conviction may well have rested on this invalid ground alone, whether or not it also could have rested upon a valid one. This flouts *Stromberg v. California*, 283 U. S. 359 and *Williams v. North Carolina*, 317 U. S. 287.

5. The prosecution failed to prove petitioner's guilt.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said cause, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

SERGE M. RUBINSTEIN,
Petitioner.

Dated: March 4, 1948.

By EDWIN P. WOLCHOK,
LEMUEL B. SCHOFIELD,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

Statements (as to Occupation) Made for the Purpose of Deferment Are Not Statements as to Nonliability for Service.

The Act proscribes false statements as to nonliability for service. It does not proscribe false statements as to deferment.

The indictment charges petitioner, in accordance with the statute, with making and being party to the making of false statements as to his nonliability for service. The prosecution showed that petitioner was a party to the making of certain statements with respect to his occupation for the purpose merely of obtaining a deferment. As a matter of fact in requesting deferment, petitioner conceded his liability for service.

Obviously petitioner cannot be guilty of making a false statement in violation of the act if the declaration proved is not a statement as to "nonliability for service." "Liability for service" means the legal obligation to serve. Not all who were subject to the legal obligation to serve were inducted by means of the draft system into the armed forces. Some were deferred temporarily and inducted later; some were deferred and never inducted. "Nonliability for service" means the absence of a legal obligation to serve.

The Act creates this clear legal distinction between "nonliability for service" and "deferment." Those liable for service are eligible for deferment under Section 5 of the Act, 50 USCA, Appendix Section 305 (c) (e) (k); and every person liable for service under the Act remains liable

despite deferment: cf. Selective Service Regulations Arts. 622.11, 622.22-2, 622.25-2, 622.31-2, 622.36, 622.71, 626.1.[1]

On the other hand one who is not liable for training and service is not subject to future induction; his status is fixed and he is no longer subject to liability under the Act. § 3 of the Act, 50 U. S. C. A. App. § 303 (a); *U. S. v. Cain*, 147 Fed. 2d 449 (C. C. A. 2, 1945).

The Act makes liability for service the general rule. Then, after setting forth certain categories of males who are relieved from such liability,[2] the Act provides that of

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[1] Senator Sheppard, Chairman of the Senate Committee on Military Affairs, analyzing the provisions of the bill on the Senate floor, said (86 Cong. Rec., pp. 10093-10094):

> "Those who are liable for service will be classified depending upon their degree of availability for military service; but *all, regardless of their classification, will continue to be liable for military service.* • • •
>
> "• • • The words 'who are liable for such training and service, but who are not deferred after classification' are a further indication that *liability continues regardless of deferment.*" (Emphasis supplied.)

[2] Various provisions of the Act grant *relief from liability for training and service.* There are several categories of persons who are thus relieved from liability.

> 1. Citizens or subjects of a neutral country, who prior to induction apply to be relieved from liability. Section 3 of the Act, 50 USCA App. § 303 (a).
>
> 2. In time of peace, one who completes at least 12 months training and service in the land forces and who thereafter serves satisfactorily in the regular Army or in the active National Guard for a period of at least two years. Section 3 of the Act, 50 USCA App. § 303 (c).
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> 3. Section 5 of the Act (50 U. S. C. A. App. § 305 (a)) lists categories and groups, who are not required even to register, and who are relieved from liability. Apart from officers and men of the armed forces, this provision includes "persons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States, and

those who remain liable to serve, in the process following registration, the local boards, upon consideration of the facts, may either select registrants for induction or grant (1) exemptions; (2) deferments; or (3) postponements of induction.[3]

Numerous sections throughout the Act clearly disclose the sharp distinction made between *nonliability for service,*

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who have not declared their intention to become citizens of the United States. . . ."

4. The same section of the Act, 50 U. S. C. A. App. § 305 (b) provides that in peace time certain categories are relieved from liability for training and service. These are mainly individuals who have served in a specified time and manner in the regular Armed Forces or in the National Guard or reserve components of the Armed Forces.

[3] Statutory authority for such draft board action prior to induction is as follows:

(1) *Exemptions.*

Section 5 of the Act, 50 U. S. C. A. App. § 305 (d) grants an exemption to regular or duly ordained ministers of religion and certain theological students.

The same section of the Act, 50 U. S. C. A. App. § 305 (g), grants an exemption from combatant training and service under certain conditions to conscientious objectors.

(2) *Deferments.*

Section 5 of the Act, 50 U. S. C. A. App. § 305 (c) (e) (k) provides that certain categories shall be deferred. These include deferments for elected and appointed officials, occupational deferments, dependency deferments, physical and mental deficiency deferments, marital deferments and certain others.

(3) *Postponement of Induction.*

Section 5 of the Act, 50 U. S. C. A. App. § 305 (f), provides for the postponement of the induction of certain high school students.

on the one hand, and *exemption, deferment* or *postponement* of induction, on the other.[4]

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[4] Section 3 of the Act, 50 U. S. C. A. App. § 304, provides that the "selection of men for training and service under section 3 . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, *from the men who are liable for such training and service* and who at the time of selection are registered and classified *but not deferred or exempted.*" The same section of the Act, 50 U. S. C. A. App. § 304 (b), in dealing with quotas refers to men "who are *liable for such training* and service but who are *not deferred after classification.*"

Section 5 of the Act, 50 U. S. C. A. App. § 305 (h) provides "No exception from registration, or exemption or *deferment* from training and service, under this Act, shall continue after the cause therefor ceases to exist." (Significantly, liability for service is omitted.)

Section 5, 50 U. S. C. A. App. § 305 (l) dealing with finality of the President's determination in matters of this kind states, "The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or *deferment* from, training and service under this Act; and the determination of the President shall be final."

Section 5 of the Act, 50 U. S. C. A. App. § 305 (m) in providing for a quasi deferment to married men, married prior to December 8, 1941, with children, states that they "will be inducted after the induction of other registrants not *deferred, exempted, relieved from liability,* or *postponed from induction under this Act.* . . ."

Section 7 of the Act, 50 U. S. C. A. App. § 307 in prohibiting bounties for enlistment or induction, substitutes and payments to escape service, provides that "no person *liable for training and service* shall be permitted to escape such training and service or be discharged therefrom prior to the expiration of his period of such training and service by the payment of money or any other valuable thing whatsoever as consideration for his release from such training and service or *liability therefor.*"

Section 10, 50 U. S. C. A. App. § 310 (a) (2) which sets up the administrative provisions of the Act provides, inter

Repeated references throughout the Act to the word "deferment" show that when Congress proscribed conduct relating to deferment it specifically said so. This is well illustrated in the Penal Section itself (Section 11), for there Congress expressly distinguished between deferment and nonliability for service. *Only those who are charged with the duty of enforcing the Act* are subject to criminal liability for the making of a "false . . . registration, classification, physical or medical examination, deferment, induction, enrollment, or muster . . .", whereas *any person* who makes a false statement as to "fitness or unfitness or liability or nonliability" commits a criminal offense.

The Circuit Court of Appeals recognized the validity of this argument (2231a). But the court refused to apply it here because it would mean that there was a "loop-hole" in the penal provision of the Act. The court felt that Congress could not so have intended (2233a).

The obvious answer to such reasoning is that courts are bound by what Congress said where, as here, the language is clear, and cannot act upon what Congress did not say, nor upon what the court thinks Congress should have said. The action by the court below in departing from this accepted judicial standard is a clear case of judicial legislation. *Viereck v. United States,* 318 U. S. 236 (1942).

In support of its conclusion, the court below pointed out that in the Selective Draft Act for the First World

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alia, for jurisdiction of the local boards to determine all questions or claims with respect to "inclusion for, or exemption or *deferment* from, training and service under this Act of all individuals within the jurisdiction of such local boards."

Section 11, 50 U. S. C. A. App. § 311, the criminal offense section, proscribes the making of a "false . . . registration, classification, physical or mental examination, *deferment,* induction, enrollment or muster" by one who administers the Act but in the same sentence prohibits the making by any person of a false statement only as to "*nonliability for service.*" (Emphasis supplied throughout.)

War (Act of May 18, 1917, 40 Stat. 78), false statements concerning liability for service and false statements concerning "partial military service" were both punishable. (2233a) In view of that, the court reasoned that "nonliability" as used in the penal section of the 1940 Act, patterned as it was after the 1917 Act, was broad enough to include "deferment," holding that "deferment" under the 1940 Act was substantially identical with "partial military service" under the 1917 Act. (2233a)

But these concepts are not only dissimilar; they are contradictory. Partial military service under the 1917 Act involved induction into service for limited duty; it corresponded to "limited service" in World War II, which likewise involved induction into the armed forces. Deferment on the other hand involves no present induction. Hence it stands between nonliability on the one hand which negates any service at all, and service, whether full, partial or limited, on the other hand.

There could be no more convincing argument that Congress deliberately omitted making false statements as to deferment criminal, than to compare the Selective Draft Act of 1917 with the Selective Training and Service Act of 1940. In the 1917 Act there was no provision whatever for deferment and therefore the penal section of that Act, the text of which appears as Appendix B, did not make any conduct with relation to deferment criminal. But in the Act of 1940 the local boards, through the President, were given power to grant deferments and the penal section of the Act demonstrates that Congress was aware of the necessity of making certain conduct relative to deferments criminal. In the penal section it carefully provided that any one charged with the duty of carrying out any of the provisions of the Act would be guilty of a crime if he made a false deferment. The failure, therefore, of Congress in the same section to make criminal the making of a false statement to obtain deferment is of crucial significance.

There is no *authority* for the proposition that a false statement as to grounds for deferment is a false statement as to "nonliability for service" and so punishable under the Act.

In *United States v. Rooth*, 159 F. 2d 659 (C. C. A. 2, 1947), cited by the court below (2232a), the defendant was convicted of "unlawfully causing false information to be furnished to a local draft board," relating to his employment in essential industry. On appeal, the court in a *per curiam* opinion affirmed the conviction. But it did not consider the distinction between a statement as to nonliability for service and one as to deferment. It does not appear that this point was even urged.

In *United States v. Gallo*, 50 F. Supp. 158 (D. C. E. D. N. Y. 1943) the defendant was found guilty of making false statements in a questionnaire submitted to the local draft board. The statements related to his marital and dependency status. The defendant contended, not that the statements did not go to nonliability, but that they were immaterial. His contention was rejected, and it is obvious that the question herein considered was not touched upon.

On the other hand there is a decision, in which certiorari was denied by this Court, which strikingly illustrates the criminal responsibility of one who makes a false statement as to his *liability for service*. In *U. S. v. Peskoe*, 157 F. 2d 935 (C. C. A. 3, 1946), cert. den'd. 67 S. Ct. 895, also cited by the court below (2232a), the defendant falsely stated that he was a reserve Army officer and therefore relieved from liability for service under § 5 of the Act, 50 U. S. C. A. App. § 305 (a). Although Peskoe had once been a reserve Army officer, his commission had expired prior to the making of the statement to the draft board. Because this was a claim for relief from liability the Circuit Court of Appeals for the Third Circuit quite properly upheld the conviction.

The coverage of the penal section of this important federal criminal statute is an issue of first impression in the federal courts and should be settled by this Court, so that if

it is ever again necessary to use it, its meaning will be clear, or it will have been amended.

II.

Assertions That the Successful Continuance of Corporate Operations Depends Upon the Executive Head Remaining With the Corporation and That It Is Impossible to Replace Him Without Seriously Impairing Its Activities, Are Merely Expressions of Opinion and Expectation and Are Not "Statements" Proscribed by the Act.

In the second and third counts the "false statements" charged are not statements as to a past or existing fact. The pivotal affidavit stated that the "*successful continuance* of the operations" of various companies depended upon petitioner's "*remaining* with the said company." It also stated that "it is impossible to *replace* Serge M. Rubinstein without *seriously impairing* the drilling program and otherwise *hampering* the activities" of the said companies.

The sole question in issue, whether petitioner was as important to the successful operation of these companies as Foster thought him to be, was a matter of opinion only. The word "successful" labels itself as a word of opinion. So does the word "seriously." Successful operation to one man might mean something entirely different to another. Impairment of a company's program might be serious to one man and not to another. Foster was merely foretelling what he thought the consequences *would be*. This was not only a statement of opinion but on its face was a mere prophecy.

The court below stated that petitioner contended that statements made in support of requests for occupational deferment "of necessity had to be, but expressions of opinion" (2235a). But petitioner made no such contention. His contention was that the affidavit did contain statements of fact as well as statements of opinion, but that only the statements of fact could be "false statements" within the meaning of the Act, and that the prosecution did not charge

any statements of fact to have been false but only alleged falsity as to those assertions which were merely expressions of opinion.

Also the court below, while disclaiming reliance upon the proposition, declared that "the statements, however, seem to have related to his employment and his employers' need for his services as of the time they were made and thus appear to be statements of present facts so far as those facts were definitely ascertainable" (2235a). But even if these statements can be said to "relate" to petitioner's employment and his employers' need for his present services, such was not the issue framed by the indictment, nor could that question properly be submitted to the jury as a basis for conviction. The charge was that Foster's opinion of petitioner's *future importance* was a "false statement."

It must be remembered that there is no issue in this case in connection with counts 2 and 3 as to the *fact* of petitioner's employment or the various positions he held with the companies. The prosecution did not charge that any false statements were made in either of those respects. It charged merely that the *appraisal* of petitioner's services by Foster was false. It is this and only this, which the prosecution challenged.

The prosecution itself showed that petitioner's relationship to the named companies was as follows: He was American manager of Chosen Inc., a British holding company, which through other companies controlled Midway Victory Oil Co.; he was a director and chairman of the board of directors, member and acting chairman of the executive committee of the board of directors, and also president of Panhandle Producing and Refining Co.; and he was a director and president of Panhandle Steel Products Co. The prosecution also showed that petitioner had made changes in the boards of directors and in the operating methods of these companies and their subsidiaries to secure obedience to his orders and give direction to his management.

Even if Foster were wrong in his appraisal, *can it be said he was guilty of a criminally false statement?* He stated only his opinion of petitioner's importance; that others, including a jury, may differ does not make his statement a crime. In this case, no *fact* presented to the board as to counts 2 and 3 is charged to have been false.

The court below regarded the assertions as expressions of opinion relating to future matters but refused to hold that they could not form a basis for conviction because "the making of them implied that the makers believed them to be true" (2235a). The court concluded that if such a belief were not honestly entertained the statement contained a misrepresentation of present fact (2235a).

It seems to petitioner, however, that for a statement to be criminally false at least two elements must concur: (1) the statement must be untrue when tested by presently available standards; (2) it must be believed by the maker to be false. The Court below assumed that only the second element need be present. Its opinion indicates that the statement need not in fact be false, it being necessary only that the maker believe it to be false. But petitioner suggests that an opinion as to the future, particularly where, as here, the one stating the opinion has no control over that future, is a statement which cannot be either true or false within the meaning of a criminal statute.

The court justified its reasoning on the ground that to hold otherwise would have meant that administration of the Act "would have been overly difficult and unduly burdensome" (2235a-2236a). It is respectfully submitted that no decision of this Court or any other court justifies creating a new principle of criminal law based upon administrative hardship.

Our research has disclosed no decided case involving the Act in which a defendant was convicted for making false statements where the assertions were similar in kind to the instant case. The cases in which convictions were sustained all involve false statements as to a past or existing fact. See *U. S. v. Gallo,* 50 F. Supp. 158 (D. C. E. D. N. Y. 1943);

U. S. v. Peskoe, 157 F. 2nd 935 (C. C. A. 3, 1946); *Arnold v. U. S.,* 134 F. 2d 831 (C. C. A. 5, 1943). See also *U. S. v. Schachtrup,* 140 F. 2d 415, 418 (C. C. A. 7, 1944), where exaggeration and inaccuracy of detail in describing a registrant's occupation were held not to constitute a false statement.

The court below refused to apply the rule of *Chaplin v. U. S.,* 157 F. 2d 697 (App. D. C. 1946), stating that to the extent it "may be in conflict herewith we decline to follow it" (2236a). In that case, a conviction for obtaining money by false pretenses was reversed because the indictment charged the defendant with securing money upon the false pretense that he "*would* purchase some liquor stamps with said money and . . . *would* return . . . any money so advanced. . . ." It was contended by the prosecution that the defendant's intention was the existing fact about which the representation had been made, but this argument was rejected by the court.

It is to be noted that even those courts which do not go as far as the *Chaplin* case as to statements of intention, still do not extend their decisions to encompass statements of opinion, particularly where such opinion relates to the future. See *U. S. v. Hall,* 248 Fed. 150 (D. C. Montana 1918); *Little v. U. S.,* 73 F. 2d 861, 868 (C. C. A. 10, 1934); *Phillips Petroleum Co. v. Rau Const. Co.,* 130 F. 2d 499 (C. C. A. 8, 1942); *Gordon v. Butler,* 105 U. S. 553, 557 (1881).

The court below cited several decisions as comparable to its present holding (2235a), but they do not support it. *Durland v. U. S.,* 161 U. S. 306; *U. S. v. Comyns, et al.,* 248 U. S. 349; *Amos v. U. S.,* 13 F. 2d 327 (C. C. A. 2); *Knickerbocker Merchandising Co., Inc., et al. v. U. S.,* 13 F. 2d 544 (C. C. A. 2); *Van Riper, et al. v. U. S.,* 13 F. 2d 961 (C. C. A. 2), and *U. S. v. Rowe, et al.,* 56 F. 2d 747 (C. C. A. 2) were all prosecutions under Section 215 of the Criminal Code, 18 U. S. C. A. 338, the text of which appears herein as Appendix C.

It is clear that the essential elements of a prosecution under that section are merely that a scheme to defraud is devised and the mails are used in furtherance of it. It is not essential to successful prosecution that a false statement be made by mail or otherwise. False statements may be significant in such prosecutions, but are not determinative either of guilt or innocence. Hence, it would appear that in such prosecutions any representation made as to the past or present or suggestions and promises as to the future which are in fact part of a scheme to defraud or which are made with intent to defraud, are of the essence of the crime. A misrepresentation of present intent as to the future may constitute evidence of the very scheme which is proscribed. A promise which the promisor has no present intention of keeping may be fraudulent. Section 215 specifically proscribed "false or fraudulent pretenses, representations or promises." But here there is neither a promise nor a statement of intent; hence it is suggested that those decisions are not authority in the present inquiry.

U. S. v. Uram, et al., 148 F. 2d 187 (C. C. A. 2) involved an indictment under the penal provisions of the National Housing Act, Section 512 (a), 12 U. S. C. A. 1731 (a), the text of which appears herein as Appendix D. This section provides that it is an offense where anyone "wilfully overvalues any security, asset, or income." Obviously, therefore, a falsely stated opinion comes within the coverage of the statute.

In the *Uram* case, also, Section 35 of the Criminal Code, 18 U. S. C. A. 80, the text of which appears herein as Appendix E, was relied upon. But that statute, unlike the one presently involved, proscribed representations and claims which are "false, fictitious or fraudulent." The *Uram* case did not specifically hold that a present statement coupled with a false promise constituted a "false statement." No such holding was necessary to the decision.

Irish v. Central Vermont Railway, Inc., 164 F. 2d 837 (C. C. A. 2) was a civil action under the Federal Employers Liability Act, involving the validity of a certain release. It is true that the Second Circuit held in that case that a false promise was sufficient to defeat the release on the ground that it was induced by a promise that the promisor did not intend to keep. That is far different, however, from saying that such a promise is a "false statement" within the meaning of the statute which is presently involved. Even if it were, no promise was made in the instant case.

It is respectfully submitted that in view of the conflict in the decisions in the Circuit Courts of Appeals, particularly as noted in the opinion of the court below, and the emergence of the Circuit Court's novel doctrine that administrative hardship relieves the prosecution of proof of guilt as defined and limited by statute, and since there is no controlling decision by this Court, the writ should be allowed.

III.

The Conspiracy Counts Fall Within the Prohibition That Where a Substantive Offense Requires Concert of Action There Can Be No Additional Conviction and Punishment of Conspiracy to Commit That Offense.

Petitioner is charged in each of the second and fourth counts with "making and being a party to the making" of certain false statements contained in Form 42-A (G. Ex. 15-A). This was an employer's questionnaire which could have been executed only by an employer, viz., Foster in Count 2 and Hart in Count 4. *Petitioner alone could not have committed the crimes charged in these counts.*

Petitioner submits that his guilt could be predicated only upon his being a "party to the making"; it is just as if the statute applied only to one who was "a party to the making." Therefore his additional conviction and punishment on the conspiracy counts, 3 and 5, should not have

been allowed because of the rule that where a substantive offense requires concert of action there can be no additional conviction of conspiracy to commit that offense.

This salutary rule has been recognized by this Court in *Gebardi v. United States,* 287 U. S. 112, 122 (1933), and *Pinkerton v. United States,* 328 U. S. 640, 643 (1946), and was specifically held to be settled law by the Second Circuit itself in *United States v. Zeuli,* 137 F. 2d 845 (C. C. A. 2, 1943).[5] But the court below unduly restricted the rule by holding that it applies only where *the statute itself* requires concert of action, refusing to apply it where, as here, the offense *as charged and proved* is one which can be committed only by such concert of action.

The history of conspiracy statutes shows that the crime has been looked upon as an aggravation because of plurality of agents. 2 Wharton's Crim. Law, 12 ed. sec. 1604. It has often been the last resort of those who, distrusting collective action, denominate conduct as criminal when committed by two or more which is legal when indulged in by one alone. Happily our general conspiracy statute repudiates this doctrine by requiring either that a conspiracy be one to defraud the United States or to commit an offense against the United States. Criminal Code sec. 37, 18 U. S. C. A. 88.

Likewise, the penal section of the Selective Training and Service Act of 1940 defines the conduct which constitutes the substantive offense and thus limits the criminal conspiracy proscribed therein. Still, aggravation because of plurality of agents is the core of punishment for conspiracy. The rule is that no such aggravation is present to justify a conviction of conspiracy when plurality of agents is required by statute for the substantive offense. So, too, there is no aggravation warranting additional pun-

[5] See the views of the Conference of Senior Circuit Judges (Annual Report of Attorney General for 1925). See also as it applies to the present case the dissenting opinion of Mr. Justice Rutledge in *Pinkerton v. United States,* 328 U. S. 640, at p. 648.

ishment where, as here, the offense as charged and proved, could not have been committed by petitioner without the co-operation of someone else, and where there was no element of the conspiracy not present in the substantive offense. The reasoning underlying the first proposition applies equally to the second. In both situations to commit the crime for which punishment is imposed, co-operative action is required, and the conspiracy and substantive offense are so closely related that the law for purpose of punishment must treat them as one.

There is no clear-cut decision by this Court applying the rule or defining its limitations. There should be. It is unsettled whether this question must be resolved by considering the statute alone, as held in the present case, or whether reference may be had to the charge contained in the indictment and the facts of the case. In fact there is a conflict in the Second Circuit itself because in the *Zeuli* case, supra, the court considered not only the indictment but the evidence as well.

In deciding a related question of res judicata arising out of a trial of a substantive offense after acquittal of conspiracy, this Court in *Sealfon v. United States,* 68 S. Ct. 237, held it necessary to consider the evidence. If the evidence is controlling where the question of additional punishment arises because of successive trials, petitioner suggests that the charge and the evidence should also be considered where two punishments are imposed at the same trial.

If a prior acquittal of conspiracy as in the *Sealfon* case may, because of the evidence, preclude subsequent trial of the substantive offense on the ground that the issues are identical, surely this Court may examine the issues and evidence where two punishments are sought to be imposed on two charges at the same trial. The issue here is not necessarily whether both charges could be tried together or successively but whether two punishments could be imposed for conduct which, if any offense at all, is only one.

IV.

It Was Error for the Court to Refuse a Point for Charge That No Conviction Could Be Had Upon a Finding That the Corporations Were Not Engaged in the War Effort to the Extent Claimed, Since the Indictment Contained No Charge of Falsity in That Respect.

Count 2 charged that false statements were made as to petitioner's importance to his various companies. It did not contain any charge that the companies were not engaged in war work nor in work important to the war effort. The prosecution introduced evidence that the companies were not important to the war effort to the extent claimed. This evidence properly could be considered on the issue of "wilfulness", and no complaint is made that it was admitted.

But the trial judge was asked (2200a-2201a) to instruct the jury that it could not *base a conviction* upon a finding that the companies were not essential to the war effort to the extent claimed, since that was not the crime for which petitioner was indicted. He erroneously refused so to charge (2156a).

This argument was made below but the court dismissed it on the mistaken ground that the point had not been raised at the trial. It stated in a footnote that "there was no request so to limit this evidence" (2237a). Petitioner noted in his brief before the Court below that this had been called to the trial judge's attention in points for charge as follows: Rubinstein 55, 56, 58 (2200a-2201a), Foster 16 (2231a), all of which were refused by the trial judge (2156a, 2149a).

The jury's verdict may have rested on this invalid ground alone since the general verdict on each of these two counts did not specify the basis on which it rested. *Stromberg v. California,* 283 U. S. 359 (1931); *Williams v. North Carolina,* 317 U. S. 298 (1942).

V.

The Prosecution Failed to Prove That the Statements Alleged to Be False Were False.

Petitioner does not propose in this brief to analyze the testimony with reference to specific items and in detail. However, since it is abundantly clear that the prosecution failed in maintaining its burden of proving falsity of the statements alleged as false, a review of the evidence, at least in summary, is indicated.

As to Count 2: Petitioner respectfully refers this Court to the argument advanced in the brief of petitioner Foster which, as it applies to him, petitioner adopts.

As to Count 4: The prosecution relied upon *negative* testimony in attempting to show that petitioner was neither employed on August 2, 1943, nor on October 12, 1943, by Taylorcraft Aviation Corporation. It produced testimony of witnesses who stated they had not seen petitioner and did not know that he had been working for Taylorcraft. However, in cross-examination, these same prosecution witnesses acknowledged that they had little or no reason to be aware of petitioner's employment in the company and that others had worked for Taylorcraft in similar positions without their knowledge.

Here again, as in Count 2, the prosecution itself introduced *affirmative* evidence which not only destroyed its negative case, but actually proved the converse. This evidence was: a contract of employment (G. Ex. 95), documentary evidence in the form of replacement lists (G. Ex. 92) and salary check stubs (D. Ex. 74), which established petitioner's employment as executive assistant to the president of Taylorcraft Aviation Corporation.

And, since under the proof it was evident that petitioner was so employed on October 12, 1943, it is immaterial whether he had earlier been so employed. If he were *then* so employed and his position warranted deferment, it cannot be argued that he should nevertheless

be denied deferment because he had not been so engaged for two months previously or any other prior period stated by him or arbitrarily fixed by the Board. This is so, because the Board had intimate knowledge of petitioner's experience along the line of his duties with Taylorcraft. Therefore, it was completely immaterial in determining his future status, since he was skilled in his duties, to know that he had spent two months with that particular company.

The prosecution not only failed to prove that the statement as to petitioner's employment on August 2, 1943, was false but also failed to establish that it was material.

As to the conspiracy counts, 3 and 5: Since the prosecution relied upon the commission of the substantive offenses in counts 2 and 4 to prove the existence of the conspiracy in counts 3 and 5 respectively, and since the prosecution failed to prove the commission of the substantive offenses, the conspiracy counts must likewise fall: *Gebardi v. U. S.*, 287 U. S. 112, 123 (1933); *U. S. v. Biggs*, 211 U. S. 507, 521 (1909); *Fain v. U. S.*, 209 Fed. 525, 531 (C. C. A. 8, 1913); *Fulbright v. U. S.*, 91 F. 2d 210 (C. C. A. 8, 1937).

CONCLUSION.

Petitioner respectfully submits that his conviction is unjust and should be reviewed by this Honorable Court and therefore prays that a writ of certiorari be granted.

Respectfully submitted,

EDWIN B. WOLCHOK,
LEMUEL B. SCHOFIELD,
Attorneys for Petitioner.

APPENDIX "A".

Sec. 311 of the Selective Training and Service Act of 1940, 54 Stat. 894, 50 U. S. C. A. App. sec. 311.

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or

by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act."

APPENDIX "B".

Section 6 of the Selective Draft Act of 1917, 40 Stat. 76, 50 U. S. C. A. following section 226.

"Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court martial and suffer such punishment as a court martial may direct."

APPENDIX "C".

Criminal Code, Section 215, 35 Stat. 1130, 18 U. S. C. A. 338.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit-money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'green goods,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

APPENDIX "D".

Section 512 (a) National Housing Act, 55 Stat. 365, 12 U. S. C. A. 1731 (a).

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration under this chapter, (makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited), or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both."

APPENDIX "E".

Criminal Code, Section 35 (A), 52 Stat. 197, 18 U. S. C. A. 80.

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

INDEX TO REPLY BRIEF.

TABLE OF CITATIONS.

IN THE

Supreme Court of the United States.

No. 647. October Term, 1947.

SERGE M. RUBINSTEIN, ALSO KNOWN AS SERGE MANUEL RUBINSTEIN DE ROVELLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 648. October Term, 1947.

ALLEN GORDON FOSTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

1. As to Whether It Was a Criminal Offense to Make False Statements to Secure a Deferment.

The Government does not dispute that the word "liability" in every other section of the Selective Training and Service Act has a meaning different from that which it ascribes to the word as used in Section 11, the criminal section of the Act. To justify this arbitrary position, it is said regarding non-liability and deferment (p. 17): "And it is unreasonable to believe that Congress did not intend to extend the enforcement provisions to this category as well as the other."

However, *Congress said differently.* If regard is not to be had to its language, any conclusion is purely conjectural. And this Court, considering the same reasoning applied to another federal statute, just recently has answered this contention by stating that such an argument

is not to be addressed to this Court, but to Congress. See *United States v. Paul Evans,* No. 15, October Term, 1947, decided on March 15, 1948.

Peskoe v. United States, No. 874, October Term, 1946, 330 U. S. 824, cited by the Government, has no application here. It was a case where a false statement was made as to "liability" as the word is used in Section 11. This is perfectly clear as pointed out in petitioners' briefs (Rubinstein p. 17, Foster p. 15).

The Government's position rests upon the assumption of an untenable major premise that "exemption" is the same as "non-liability" or "relieved from liability." From this it argues that deferment is simply a partial exemption since both exemption and deferment may be granted by a draft board upon cause shown. Even if that were so it does not follow that deferment is the same as non-liability. The Act throughout makes a distinction between non-liability and exemption and permits the local boards to select only "from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted." Section 4, 50 U. S. C. A. App. § 304 (a). See also, Section 5 (a) (m), 50 U. S. C. A. App. § 305 (a) (m). See also, Petitioner Rubinstein's Brief, footnotes 2, 3 and 4, pp. 12-15.

The Government says (pp. 16-17):

> "In contrast to the exempt status, a deferred classification meant that the registrant was not then liable for selection for service, but that at any time in the future, if his situation changed or if the regulations establishing deferred categories were amended, his classification might then be changed to I-A, and he would then become liable for selection for military service. The sole difference between an exemption and a deferment was the difference between being totally relieved of service and being relieved on condition subsequent."

This is fallacious and misleading. One who was deferred remained liable nevertheless; he did not, if his deferment were rescinded, subsequently become liable or bcome liable "on condition subsequent". The Government apparently uses the phrase "liable for selection" as synonymous with "liable for service", but they are clearly different concepts. Selection and liability are not the same and Section 11 applies only to the latter. One who was "liable for service" may or may not have been "liable for selection", in the sense the Government misuses that phrase. A registrant granted deferment could not be *selected* for service during the period of his deferment, but at all times remained *liable for service.*

It is the Government which speaks of "liable for selection"; the statute does not.

2. As to Whether the Statements of Opinion Alleged to Be False in Counts 2 and 3 Are "False Statements" Within the Meaning of the Act.

As stated in the Government's brief, the second question is as follows (p. 2):

> "Whether deliberately false statements as to the importance of a registrant to a business fail to come within the purview of Section 11 because they involve matters of opinion."

This statement indicates that what was alleged to be false in the indictment was a statement both of fact and of opinion and that the question really is whether merely by adding a statement of opinion to a statement of fact a defendant can insulate himself against criminal prosecution for the false statement of fact.

But this is not the issue. Although Form 42-A did contain statements of fact it was *not those statements* which were alleged to be false, but *only the other statements of opinion.*

The Government points out (p. 19):

> "The statement that, 'because of the character' of Rubinstein's functions, the success of the business depended upon his continuing employment, obviously referred to the statement of duties set forth in the prior portion of the affidavit (see Statement, *supra*, p. 6). These were clearly false statements of fact as to the 'character' of Rubinstein's functions which were carried over into the statement alleged in the indictment."

The Government discreetly ignores, however, the fact that although the indictment recites that Form 42-A containing Foster's opinion as to Rubinstein's future importance was made "because of the character of Serge M. Rubinstein's functions", the indictment goes on to charge only that the opinion was false. *The indictment does not charge that the statements as to the character of his functions were false.*

In its brief, the Government states (p. 20): "No conflict of decisions is here involved." In this it differs from the court below which said there is, citing *Chaplin v. United States*, 157 F. 2d 697 (App. D. C.). The court below again said just the other day that its views as to the criminality of opinions, even as to the future, are irreconcilable with the *Chaplin* case. In *United States v. Grayson*, No. 136, October Term, 1947, C. C. A. 2nd, decided March 4, 1948, the court said:

> "It is true that in *Chaplin v. United States* the Court of Appeals for the District of Columbia by a divided court felt bound to hold otherwise in a prosecution for obtaining money under false pretenses. We have recently refused to follow this ruling in a prosecution for evading the Selective Service Act [this case]; and certainly it has never applied to the statute for fraudulent use of the mails."

The Government further states, in arguing that statements of opinion may be "false statements", that this has

been so held "even in the civil law of fraud" (p. 20). It would seem that the Government is here advocating the novel proposition that it requires less to prove fraud in a criminal case than in a civil case. And, in support of its position that there is no conflict on this issue, the Government cites civil cases from Circuit Courts *other than those from which criminal cases* were cited by petitioners, indicating that the conflict is wider even than petitioners pointed out.

3. As to the Refusal of the Request to Instruct the Jury on the Use of Evidence Admissible for a Limited Purpose.

The Government states this issue as follows (p. 2):

> "Whether, after instructing the jury as to the nature of the offense charged in the indictment, the judge was required to give instructions to the jury not to base its verdict on other evidence."

This is a literal statement of the question but it does not fairly pose the problem. The Government's brief emphasizes the importance of the evidence as to the percentage of war work (p. 11) showing that it relies even now upon such evidence to support the conviction. The problem, therefore, is really not whether petitioners could have required the trial judge to give negative instructions, but rather whether he should have stated, when requested, that evidence admissible for a limited purpose could be considered by the jury only for such purpose.

The evidence of percentage of war work was admissible on the question of intent, as the court below quite properly held. Once the jury found that these particular statements were false, it could use such finding to infer, not that the statements charged in the indictment to be false were in fact false, but only that if such statements were false they were made with knowledge of their falsity. The jury could not convict the petitioners if they found the "war work" statements *alone* to be false.

The trial judge refused so to instruct the jury, which was left completely in the dark on this important point. This refusal left the way open for petitioners' conviction upon an invalid ground.

4. As to Whether Petitioner Rubinstein Can Be Convicted of Conspiracy Since Concert of Action Was Required to Commit the Substantive Offense.

The Government says (p. 24):

> "Concert of action is not an element of the offense of making false statements as to liability for service under the Selective Training and Service Act. The employer, alone, could make false statements. A registrant, alone, could under some circumstances, cause an innocent employer to make a false statement."

Petitioner has suggested that in resolving this question the statute alone should not be determinative. The law should require at the very least that the offense *as charged in the indictment* must be considered, and really ought to require that the theory of the government's case *as disclosed by the evidence* must be considered.

While the Government states that "A registrant, alone, could under some circumstances, cause an innocent employer to make a false statement", in the instant case the *indictment* charged a statement in an *employer's* questionnaire to have been falsely made *by an employee and an employer*, and the *evidence* discloses the questionnaire to have been signed by the *employer*. This substantive offense as charged could not have been committed without cooperative action.

Respectfully submitted,

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THOMAS D. MCBRIDE,
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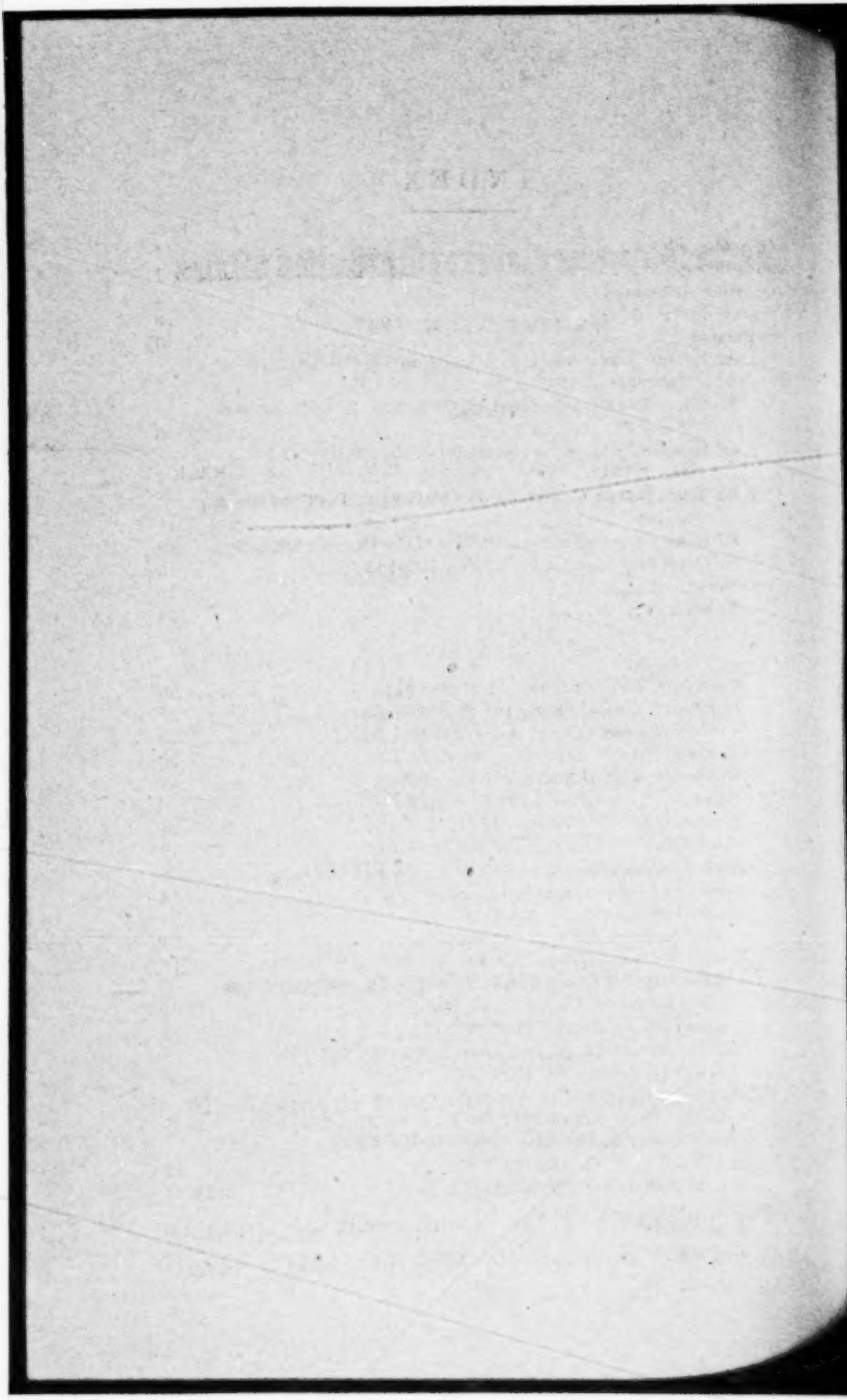
INDEX

CITATIONS



In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 647

SERGE M. RUBINSTEIN, ALSO KNOWN AS SERGE MANUEL RUBINSTEIN DE ROVELLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 648

ALLEN GORDON FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the circuit court of appeals (R. 2227–2240) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 5, 1948 (R. 2241). The

petitions for writs of certiorari were filed March 5, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether false statements in support of a claim for occupational deferments are false statements as to liability for service within the purview of Section 11 of the Selective Training and Service Act.

2. Whether deliberately false statements as to the importance of a registrant to a business fail to come within the purview of Section 11 because they involve matters of opinion.

3. Whether the evidence is sufficient to support the verdict.

4. Whether, after instructing the jury as to the nature of the offense charged in the indictment, the judge was required to give instructions to the jury not to base its verdict on other evidence.

5. As to petitioner Rubinstein (No. 647), whether he could be separately punished for being a party to the making of a false statement by the employer and for conspiracy to make such false statement.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894–895 (50 U. S. C. App., 311), provides in pertinent part:

> * * * any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *

STATEMENT

An indictment in five counts charging the making of false statements as to the liability of petitioner Rubinstein for service under the Selective Training and Service Act was returned in the United States District Court for the Southern District of New York (R. 2219–2226). The first count against Rubinstein alone is not presently

involved, since his conviction on that count was reversed on appeal (R. 2238). The second count charged that petitioners, Rubinstein and Foster, submitted false statements to the Selective Service Board in that they submitted an affidavit seeking an occupational deferment for Rubinstein which contained knowingly false statements to the effect that the successful operation of Panhandle Producing and Refining Company, Midway Victory Oil Company, and Panhandle Steel Products Company depended upon the continuance of Rubinstein's employment by those companies, and that loss of his services would seriously impair the drilling program and other activities of the companies (R. 2220–2221). The third count charged a conspiracy to commit the offense charged in the second count (R. 2222–2223). The fourth count charged that Rubinstein and defendant Hart made false statements in an affidavit for occupational deferment to the effect that Rubinstein was executive assistant to the president of Taylorcraft Aviation Corporation and had been employed by that corporation since August 2, 1943 (R. 2223–2224). The fifth count charged a conspiracy to commit the offense charged in the fourth count (R. 2224–2225).

Rubinstein was convicted on all counts and he was sentenced to imprisonment for a period of 2½ years and to pay a fine of $10,000 on each, the prison sentences to run concurrently (R. 2182, 2190–2191). Foster was convicted on counts 2

and 3 and sentenced to imprisonment for two years and to pay a fine of $5,000 on each; execution of the imprisonment sentences was suspended and he was placed on probation for five years (R. 2182, 2192). Hart was convicted on counts 4 and 5 (R. 2182) but did not appeal.

The evidence for the Government may be summarized as follows:

A. *Events preceding the submission of the affidavit of February 2, 1943.*—Rubinstein, a national of Portugal, registered with his local draft board under the Selective Training and Service Act (Ex. 2, R. 10). On March 3, 1942, he was placed in Class III–A, the classification for persons deferred because of dependents (R. 13–14). On November 19, 1942, Rubinstein submitted an occupational questionnaire in which he stated that he was chief executive officer of Midway Victory Oil Company, a corporation which had "working control" of Panhandle Producing and Refining Company and Panhandle Steel Products Company (Ex. 11, R. 19). There was also submitted an affidavit by Foster and one Duffy to the effect that Rubinstein's full time was devoted to the affairs of the companies mentioned and that his duties were the direction and management of the companies (Ex. 12, R. 19).[1] On November 25,

[1] Foster, an interior decorator, was a director of several companies in which Rubinstein was interested, including Midway Victory Oil Company and Panhandle Producing and Refining Company (R. 356). Duffy was a director of Panhandle Producing and Refining Company (R. 360).

1942, Rubinstein was classified in Class II–B, i. e., he was given an occupational deferment (Ex. 21, R. 20).

B. *The affidavit submitted on February 2, 1943 (counts 2 and 3).*—Some time after November 25, 1942, Rubinstein was placed in Class I–A, the classification for persons liable for immediate induction, and thereafter he requested a hearing before the board on that classification (R. 21–22). He appeared before the board on February 2, 1943, and submitted a number of documents (R. 24–25). Among them was Form 42A, an employer's affidavit for occupational deferment, sworn to by Foster as a director and officer of Midway Victory Oil Company and Panhandle Producing and Refining Company and as an officer of Panhandle Steel Products Company (Ex. 15A, R. 25). The affidavit stated that Rubinstein's "duties actually performed" consisted of direction of drilling operations, sale of crude and other products, negotiations for obtaining subcontracting work for shipyards, negotiations with the petroleum coordinator, and directions for negotiations of contracts for the steel plant with various government departments. It also stated that the companies were engaged in 100 percent war work. In answer to the question as to how long it would take to replace the employee, the affidavit stated that "because of the character of employee's functions the successful continuance

of operations depends upon employee remaining with the company." The affidavit further stated that it was impossible to replace Rubinstein "without seriously impairing drilling program and otherwise hampering the Companies' activities." Counts 2 and 3 are based upon these latter statements.

Duffy, a director of Panhandle Producing and Refining Company, testified that during the evening of February 2, 1943, while Foster was in his office, Rubinstein's secretary brought him a number of papers, including the Form 42A already completed (R. 357, 359, 407). Duffy started to read the form, but Rubinstein came in and took it from him and gave it to Foster (R. 357). Foster said that he wanted to read the form, but Rubinstein said that it was not necessary to do so, that Foster could sign it and Rubinstein would explain it on the way uptown (R. 357). As presented to the draft board later that evening, the form was sworn to by Foster (Ex. 15A, R. 25).

C. *Evidence relating to the falsity of the affidavit of February 2, 1943.*—Panhandle Producing and Refining Company was a holding company which did not itself engage in the production of oil and steel products (R. 360–361, 416–417). Its operating subsidiaries were located at Wichita Falls, Texas, and all activities of those companies were carried on in Texas (R. 417, 435, 506–507). The minute books and all the records

of the parent company, as well as of the subsidiaries, were kept in Wichita Falls until January 1, 1944 (R. 533). No Form 42A had been executed outside of Texas for anyone connected with the Panhandle companies except that which Rubinstein submitted to his draft board (R. 533).

Petitioner Foster had not been at the Panhandle properties in Texas (R. 532–533). None of the companies' names appeared on the door of Rubinstein's suite in New York until after February 2, 1943 (R. 533–534). Rubinstein had been in Wichita Falls only twice prior to February 2, 1943. He was there for two days in August 1942, but did not go out to the oil wells (R. 512, 538). He was there for part of one day in September when he sought unsuccessfully to have himself elected president of Panhandle Refining Company, the oil producing subsidiary (R. 512–514). Rubinstein was not an officer of Panhandle Refining Company, but only of the parent holding company (R. 513–514). He was merely a director of the subsidiary (R. 514).

The Panhandle companies had been operating for many years before Rubinstein became associated with them (R. 506). Roy B. Jones had founded the companies and was president and general manager of Panhandle Refining Company and president of Panhandle Steel Products Company (R. 506, 515). Next under him was Stanford, vice president (R. 515). Although Rubinstein became president of the Panhandle

Steel Products Company in November 1942, Jones continued active to the same extent as before in both the refining and steel products companies and continued to receive the same compensation (R. 523, 586). Rubinstein received no additional compensation as president (R. 524).

Each of the various departments of the refining company was headed by a competent person of long experience and up to February 2, 1943, Rubinstein had done absolutely nothing for any department (R. 515–521), except speak briefly about one account (R. 520). Rubinstein was never manager of field operations and did nothing by way of directing the operations of Panhandle Producing and Refining Company or any other Panhandle company in the field (R. 527). Rubinstein himself had one Stzykgold made manager of field operations (R. 521) and directed that operations be subject to the joint agreement of Stzykgold and Stanford (R. 526).

As to Panhandle Steel Products Company, Rubinstein had been at its plant only once for less than an hour in the period before February 2, 1943 (R. 431–432, 492, 502). All of the manufacturing and business operations of that company were supervised by the witness Helmcamp (R. 494–495), who, as vice-president, general manager and director (R. 428), secured and filled orders, purchased raw materials and distributed them, directed its personnel and determined their wages and salaries, and was entirely responsible for all

of its operations, activities and production generally (R. 494–497). All of the company's employees reported to Helmcamp alone (R. 430) and all of the company's business was conducted at Wichita Falls (R. 496).

On questions of policy, Helmcamp consulted only Jones, Stanford, and the directors resident at Wichita Falls, not Rubinstein (R. 430–431, 491–492), even after Rubinstein became president of the company (R. 492–493). All directors' meetings were held at Wichita Falls (R. 435–436), and up to February 2, 1943, Helmcamp made no reports of any sort to Rubinstein (R. 439, 472), reporting only to Jones and Stanford (R. 492–493); nor did he receive any orders, instructions, or advice from Rubinstein (R. 491, 496–497).

As to Midway Victory Oil Company, it was for the most part merely a corporate entity through which Rubinstein purchased and sold securities (R. 366). Four employees were sufficient to conduct its oil business in Texas (R. 365–366, 1094–1095). Such drilling as was conducted was in charge of one Cassidy (R. 423–424).

Rubinstein did not devote full time to the affairs of the Panhandle companies. In December 1942, he wrote to a fellow director of the parent Panhandle company as follows (Ex. 79, R. 634):

> The Directors have appointed me president [of the parent company], which post I have accepted with the understanding that until such time as I am able to devote more

> time to the company's operations I will receive only $300 a month in lieu of my Executive Committee fees of $225.

Similarly, on two or three occasions in 1943, Rubinstein told a Panhandle officer that he hoped his own personal affairs would soon be cleaned up, so that he could devote more time to those of Panhandle (R. 643, 670–672). In May 1942, Rubinstein had obtained permission from his draft board to go to Chile for six months to attend to his own financial affairs (Exs. 9, 10, R. 16–17).

In the affidavit submitted by Foster, it was stated that the Panhandle companies were engaged 100 percent in war work (Ex. 15A, R. 25). In fact, however, only about 30 to 50 percent of the refining company's products were used in the war effort (R. 527–528, 573–575, 578), and only about half of the steel products company's output was so used (R. 434, 480).

D. *The affidavit submitted on October 12, 1943 (counts 4 and 5).*—On the basis of the documents submitted on February 2, 1943, Rubinstein was classified II–B (R. 29). An appeal was taken by the City Director of Selective Service and the appeal board placed him in Class I–A (R. 29). On September 7, 1943, however, the local board reopened Rubinstein's classification and reclassified him II–B (R. 41). An appeal was again

taken and Rubinstein was again classified I–A (R. 41–42). He was notified of that action on October 2, and on October 8 he was ordered to report for induction on October 20 (R. 41–42, 44–45). On October 12, Rubinstein asked for another hearing and on that day he presented to the board a form 42A, signed by Hart, to the effect that Rubinstein was executive assistant to the president of Taylorcraft Aviation Corporation, that he was in charge of financial and administrative matters for the company, and that he had been employed in such capacity since August 2, 1943 (R. 46–47; Exs. 25 and 26, R. 47). Counts 4 and 5 are based upon these statements.

E. *Evidence relating to the falsity of the October affidavit.*—On October 4, two days after Rubinstein had been notified that he had been placed in Class I–A, he proposed that Panhandle Producing and Refining Company invest in Taylorcraft Aviation Corporation, but his suggestion was disapproved (Ex. 65, R. 368–369). On October 7, Rubinstein met Hart and one Buckley, both Taylorcraft directors, in New York (R. 1170). Hart and Buckley had been placed in charge of Taylorcraft by one Baker and his associates (R. 1794, 1819). Baker and his associates were negotiating for the sale of their stock in Taylorcraft and had received an offer from prospective purchasers who desired to merge Taylorcraft with their own company (R. 688,

690, 694, 1757–1758, 1794–1977), thus threatening Hart's position as president.

On October 9, Rubinstein flew with Buckley to Alliance, Ohio, where the Taylorcraft plant was located (R. 1989). On Sunday, October 10, Hart had the personnel director of Taylorcraft come to the plant (R. 699, 713–715). Hart introduced Rubinstein to the personnel director and stated that Rubinstein was to go on the Taylorcraft payroll as Hart's executive assistant, and that on approval of the board of directors, Rubinstein was to be vice president in charge of finances. He also stated that he wanted Rubinstein's name added to the Taylorcraft replacement list which was to be filed with Ohio selective service headquarters the following day. (R. 714–715.) At Hart's request, the personnel director brought him three blank forms 42A, and Hart and Rubinstein then went into Hart's office (R. 715–716). When they emerged, Hart handed the personnel director a form filled out in pencil, not in Hart's handwriting (R. 716). Mrs. Hart typed two copies of the form, which were signed and sworn to that Sunday morning (R. 716–718). One copy was left with Hart and the other copy was taken by Rubinstein (R. 729, 734).

Upon his return to New York, Rubinstein gave his secretary a purported letter of employment by Taylorcraft dated August 2, 1943, and instructed her to have it photostated and filed (R. 793–794;

Ex. 95, R. 744).[2] Rubinstein also directed that the legend, "Taylorcraft Aviation Corporation, New York Representative," be placed on the door of his suite of offices (R. 796–797).

On October 11, the personnel officer revised the replacement schedule of Taylorcraft to include Rubinstein's name and took it by plane to state selective service headquarters at Columbus, Ohio (R. 723, 727). When he returned, Hart stamped the copy of the form 42A which he had retained to indicate that the schedule had been accepted and sent it immediately to Rubinstein (R. 728–730).

On the same day in New York, at a meeting of the directors of Panhandle, Rubinstein, by personally guaranteeing Panhandle against loss, arranged for a loan by Panhandle to a holding company owned by Hart and Buckley (R. 373–374, 646–647).

Rubinstein's name did not appear on the Taylorcraft payroll register for any of the payroll periods prior to October 12, 1943 (R. 708–712). After December 14, entries were made showing compensation to Rubinstein for the period from August 2 to November 16, 1943 (R. 752). Neither the secretary of the company nor a director familiar with its financial affairs had any knowledge

[2] The letter was admittedly typed by Mrs. Hart at Taylorcraft's plant (R. 1766–1767). Mrs. Hart was at the plant on October 10, 1943 (R. 714). On August 2, 1943, Mrs. Hart was pregnant and she gave birth to a child a few days later (R. 745, 1767).

of any connection of any sort between Rubinstein and Taylorcraft (R. 687–688, 765–767; see also R. 752). In an affidavit submitted to the draft board on August 12, 1943, giving the personal history statement required of aliens, Rubinstein made no mention of any employment by Taylorcraft (Gov. Ex. 21, R. 37–40).

F. *Events subsequent to October 12, 1943.*—The local board refused to change Rubinstein's reclassification, and he was ordered to report for induction (R. 56). Thereafter he filed form 301, claiming exemption from service as the subject of a neutral country (R. 56–58).

ARGUMENT

1. Petitioners contend (No. 647, Pet. 6, 7, 11–18; No. 648, Pet. 4, 5–6, 9–16) that it was not a criminal offense to make a false statement to a local draft board with a view to obtaining a deferment from military service. They concede that the making of a false statement for the purpose of securing an exempt classification, as distinguished from a deferred one, was a violation of the third clause of Section 11 of the Selective Training and Service Act of 1940. That clause provided for the punishment of any person—

> who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the pro-

> visions of this Act, or rules, regulations, or directions made pursuant thereto * * *.

Petitioners' theory is that "liability for service" related only to the question whether a registrant was totally exempt from service under the Act, and that a false statement which did not seek to establish total exemption from service was not one in respect of the registrant's liability for service under the Act. Nothing except an extremely narrow reading of the word "liable" supports this view, and no court has read the word that narrowly. This Court denied a petition for a writ of certiorari which made, among others, the same argument. *Peskoe* v. *United States,* No. 874, October Term, 1946, 330 U. S. 824.

There is no basis, in our view, for distinguishing between a false statement directed to an exemption and one related to a deferred classification. When a local board classified a registrant in an exempt classification, it determined that he was not at any time liable for service under the Act. On the other hand, when the board determined that a registrant should be placed in a deferred classification, it determined that at that time he was not liable for service. In contrast to the exempt status, a deferred classification meant that the registrant was not then liable for selection for service, but that at any time in the future, if his situation changed or if the regulations establishing deferred categories were

amended, his classification might then be changed to I–A, and he would then become liable for selection for military service. The sole difference between an exemption and a deferment was the difference between being totally relieved of service and being relieved on condition subsequent.

In either event, it was the function of the local board to classify the registrant. Thus, for example, a minister of religion was exempt from service and was classified IV–D (Reg. 622.44); a person employed in an essential occupation was deferred and was classified II–A (Reg. 622.21). To make either classification, the board necessarily had need for the true facts. Certainly, nothing which inheres in the word "liable" requires the conclusion that Congress did not intend to proscribe the making of a false statement to a local board where the purpose of the registrant was to obtain a deferred classification. And nothing is suggested showing that Congress intended not to strike at falsity of the kind here involved.

It is said that Congress used the word "liable" in other parts of the Act in the narrower sense and that a broader construction should not be given it in Section 11. But Congress also provided for deferments (Sec. 5, 50 U. S. C. App. 305). And it is unreasonable to believe that Congress did not intend to extend the enforcement provisions to this category as well as the other. The legislative history of Section 11 shows no

more than that it was a substantial reenactment of the enforcement provisions of the Selective Draft Act of 1917 (50 U. S. C. App. 201 et seq.). See *Singer* v. *United States,* 323 U. S. 338, 342, 348. Section 6 of that act proscribed the making of a false statement as to liability for service, and this was held to include a false statement made for the purpose of delaying, on grounds of dependency, the time when the registrant would be selected for service. *Kreibich* v. *United States,* 261 Fed. 168 (C. C. A. 8). The same kind of statements are involved in these cases. It is true that there are variations between the predecessor statute and the 1940 act, but the significant feature for us is the fact that the word "liable" was broad enough in the earlier act to reach statements like petitioners' and there is nothing to suggest that Congress intended to use it in a narrower sense in the later act. There is a *casus omissus* in Section 11, as petitioners contend, only if one is read into the all-embracive language used in that provision. Construction of an important provision of an important statute does not require that the narrowest possible meaning be given to words which reasonably may be accorded a meaning more consistent with the obvious purpose of Congress. Even criminal statutes "should be given their fair meaning in accord with the evident intent of Congress." *United States* v. *Sullivan,* No. 121, decided January 19, 1948.

2. Petitioners also contend (No. 647, Pet. 6, 8, 23; No. 648, Pet. 4, 6, 16–21) that the statements in the form 42A signed by Foster, to the effect that the successful operation of the business of the Panhandle companies depended on Rubinstein's continued employment and that it was impossible to replace him without seriously impairing the drilling program—the statements specifically charged as false in counts 2 and 3—were merely statements of opinion, and hence that a prosecution for making false statements could not be based thereon. The question thus raised is largely of academic interest, since, as the court below pointed out (R. 2235), petitioners were guilty of making false representations of fact as well as of opinion. The statement that, "because of the character" of Rubinstein's functions, the success of the business depended upon his continuing employment, obviously referred to the statement of duties set forth in the prior portion of the affidavit (see Statement, *supra*, p. 6). These were clearly false statements of fact as to the "character" of Rubinstein's functions which were carried over into the statement alleged in the indictment.

In any event, the decision below is clearly correct in holding that petitioners' statements of opinion were false statements as to liability for service under the act. As this Court stated in *Seven Cases* v. *United States*, 239 U. S. 510, 517:

> state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it * * *.

Even in the civil law of fraud, the assertion in bad faith of a belief or opinion not honestly entertained under circumstances which would justify reliance on such opinion constitutes fraud. *Shell Oil Co.* v. *State Tire & Oil Co.*, 126 F. 2d 971, 974 (C. C. A. 6); *Keeler* v. *Fred T. Ley & Co.*, 65 F. 2d 499, 501 (C. C. A. 1); *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 Fed. 853, 856 (C. C. A. 2), certiorari denied, 247 U. S. 507; *Goodrich-Lockhart Co.* v. *Sears*, 270 Fed. 971, 977 (E. D. Ky.).

The same rule, we submit, must necessarily apply under Section 11 of the Selective Service and Training Act. Statements as to liability for service in many cases necessarily involved matters of opinion. Many claims for occupational deferment depended on opinions. Even medical judgments are opinions based upon observable facts. There is, of course, a vast difference between an honest error of judgment and an opinion deliberately advanced in bad faith without any honest belief therein. Manifestly, Congress must have intended that persons making statements to a draft board, necessarily involving matters of opinion, must have done so in good faith.

No conflict of decisions is involved here. The case of *Chaplin* v. *United States*, 157 F. 2d 697 (App. D. C.), upon which petitioners rely, involved a prosecution for false pretenses, a com-

mon law offense which the court held was limited by its history. The practical considerations which the court thought gave rise to the common law limitations and which the court deemed of sufficient importance to justify the continuance of the common law rule, have no application to the situation presented by the Selective Service and Training Act. Under that Act, as we have shown, statements of opinion were an integral part of the system created by Congress. As the cases cited by petitioners themselves show (see No. 647, Pet. 21–22), with respect to other offenses where false representations of state of mind would tend to subvert the purpose which the statute was designed to achieve, prosecutions based on false representations of state of mind have regularly been upheld. *Durland* v. *United States*, 161 U. S. 306; *United States* v. *Uram*, 148 F. 2d 187 (C. C. A. 2), certiorari denied *sub nom. Sohmer* v. *United States*, 325 U. S. 875.

3. The contentions that the proof was insufficient to support the verdicts (No. 647, Pet. 6, 9, 27–28; No. 648, Pet. 5, 6, 22–26) are sufficiently answered by the summary of the evidence set forth in the Statement, *supra*. In fact, the bits of evidence which petitioners have gleaned from the record to show some activity by Rubinstein in behalf of Panhandle companies (No. 648, Pet. 23–26) show that Foster could not in good faith have deemed Rubinstein necessary to the drilling operations and other activities of those companies.

As to counts 4 and 5, it is clear that Rubinstein's alleged employment by Taylorcraft was a last-minute scheme concocted in a desperate effort to avoid liability for service.

4. Petitioners further contend (No. 647, Pet. 6, 9, 26; No. 648, Pet. 4, 6, 21–22) that the trial court committed prejudicial error in failing to instruct the jury that they could not base a conviction upon a finding that the Panhandle companies were not wholly engaged in war work, as stated in the form 42A on which counts 2 and 3 were based. They admit that such evidence was properly admitted on the question of intent, but argue that the verdict of the jury might have been based on such false statements rather than on the specific statements alleged in the indictment.

At the opening of his charge, the trial judge read the indictment to the jury, including, of course, the specific allegations set forth in the various counts (R. 2163–2170). He told the jury that such were the charges to which the defendants had pleaded not guilty, and that the plea of not guilty put in issue every material allegation of the charge (R. 2170). A little later (R. 2172), he charged the jury that as to counts 2 and 4—

> It is for you to determine whether the statements of the defendants were knowingly false and to determine further whether they were material and made with

> criminal intent, that is, knowingly. If you believe that they were made honestly, then you must acquit; if you find beyond a reasonable doubt that they are false and that the defendants or any of them knew they were false, you must convict. To put it another way, it is a crime to make such statements to a Selective Service Board, knowing such statements to be false. * * *

The instruction obviously referred to the statements charged in the indictment as false, and the jury must so have understood.

Having told the jury what they must find, the judge was not required to tell them what they did not have to find. Since he did not review the evidence in the case, there was no necessity for him to go into the evidentiary details, such as the false statements respecting the extent of the war work of the Panhandle companies.

5. Rubinstein also contends (No. 647, Pet. 6, 23–25) that since counts 2 and 4 were based on employers' affidavits, he could have committed the offenses only if he acted in concert with the employers, and hence that he could not also be convicted of conspiracy to commit such offenses.[3] He relies on the rule that if an executed substantive crime necessarily involves mutual cooperation of two or more persons, such persons may not be convicted of conspiracy on the basis of the same concert of action. *United States* v. *Zeuli*, 137 F.

[3] This contention affects only the fines, since the imprisonment sentences are to be served concurrently.

2d 845 (C. C. A. 2); see *Pinkerton* v. *United States*, 328 U. S. 640; *United States* v. *Katz*, 271 U. S. 354. The doctrine of those cases is, however, limited to situations where concert of action is itself a necessary element of the substantive offense. That factor is not present here. Concert of action is not an element of the offense of making false statements as to liability for service under the Selective Training and Service Act. The employer, alone, could make false statements. A registrant, alone, could under some circumstances, cause an innocent employer to make a false statement. The mere fact that the proof in this case established guilty participation by the employer and the registrant is not sufficient to take the case out of the general rule that conspiracy to commit a crime and the crime itself are separate offenses. *United States* v. *Bayer*, 331 U. S. 532; *Pinkerton* v. *United States*, 328 U. S. 640.

CONCLUSION

We respectfully submit that the petitions for writs of certiorari should be denied.

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